

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

INDALECIO G. LOZANO
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-460
Case No. 87-11562

S.S.A. No.

UNITED TEMPORARY SERVICE
(Employer)

Employer Account No.

Office of Appeals No. IN-19628

The claimant appealed from the decision of the administrative law judge which held that the claimant was ineligible to receive unemployment insurance benefits for an indefinite period beginning May 17, 1987 under section 1264 of the Unemployment Insurance Code.

STATEMENT OF FACTS

The claimant, a Mexican citizen, entered the United States in 1972 without documentation. In July, 1986, the claimant was hired by the employer and assigned to work at A. and E. Plastics as a packer. The claimant's employment ended in mid-March, 1987.

In early May of 1987 the claimant applied for temporary residence status under a legalization program of the Immigration Reform and Control Act of 1986, Public Law 99-603 (IRCA). On May 14, 1987 the claimant obtained a "Statement of Alien Authorized to Work" from a law firm, indicating that the statement provided valid work authorization until September 1, 1987.

On May 19, 1987 the claimant filed a claim for unemployment insurance benefits. The effective date of his claim was May 17, 1987, and his base period was the calendar year of 1986.

On May 28, 1987 the employer filed a response to the claim questioning the claimant's eligibility for benefits under section 1264 of the code. Thereafter, the Department issued a determination indicating that the claimant was ineligible to receive benefits under section 1264 of the code beginning May 17, 1987 and continuing throughout the benefit year.

On July 7, 1987 the claimant received authorization from the Immigration and Naturalization Service (INS) to remain in the United States pending legalization of his status pursuant to his application for legalization.

REASONS FOR DECISION

Section 1264 of the code provides in part that unemployment compensation benefits shall not be payable on the basis of services performed by an alien unless at the time the services were rendered the alien (1) was lawfully admitted for permanent residence, (2) was lawfully present for purposes of performing such services, or (3) was permanently residing in the United States under color of law. Section 1264 is based upon a parallel provision of the Federal Unemployment Tax Act, 26 USC 3304(a)(14)(A).

The Department of Labor has interpreted the term "lawfully present for the purposes of performing services" to include those who are authorized by federal law to work regardless of their status (Unemployment Insurance Program Letter 1-86 dated October 28, 1985). The Department of Labor has also pointed out that the framers of 26 USC 3304(a)(14)(4) did not intend the State Employment Service Agencies to become immersed in the details of immigration law. Rather, these agencies should rely upon the INS to validate an alien's right to work or remain in the United States.

The claimant, who entered the United States as an undocumented person in 1972, did not satisfy any of the provisions of section 1264 of the code during the base period of his claim other than to the extent that some provision was satisfied by virtue of his eligibility and subsequent application for legalization under IRCA. Accordingly, we must decide whether the claimant's application for legalization renders him lawfully present for purposes of performing employment or permanently residing under color of law, as of:

- (1) the date his status was changed by INS,
- (2) the date he applied for legalization,

- (3) March 23, 1987, being the date that a stipulation was entered into with Catholic Social Services covering a class of aliens which would include the claimant,
- (4) November 6, 1986, which is the effective date of IRCA,
- (5) the date that IRCA requires that an alien must have entered the United States in order to be eligible to apply for legalization, which is January 1, 1982,
- (6) the date the claimant entered the United States in 1972, or
- (7) some other date.

We will first discuss IRCA in general. This federal law took effect on November 6, 1986, and makes it unlawful for employers to hire, recruit, refer or continue to employ unauthorized aliens and provides for a comprehensive program of employer sanctions for hiring unauthorized aliens or failing to screen prospective employees. Section 101(a)(3) of IRCA is a grandfather clause which provides that IRCA's amendment to the Immigration and Nationality Act (Act) making it unlawful to hire, recruit, or refer unauthorized aliens shall not apply to individuals employed by the employer prior to the enactment of IRCA, November 6, 1986. IRCA also establishes a two-step legalization program for aliens who have resided in the United States unlawfully since 1982, provides for reform of legal immigration, and includes a new program for special agricultural workers.

Under section 201 of IRCA temporary lawful residency shall be granted any alien who qualifies and makes timely application during the twelve-month period designated by the Attorney General. An alien granted temporary lawful residence will be allowed to subsequently adjust her or his status to that of an alien lawfully admitted for permanent residence upon meeting specific requirements and upon applying during the one-year period beginning with the nineteenth month after the alien was granted temporary residence status. An alien must have had continuous unlawful residence in the United States since before January 1, 1982 in order to qualify for this legalization program. Currently, under INS regulations the status of an alien whose application for temporary residence status is approved shall be adjusted to that of a lawful temporary resident as of the date indicated on the application fee receipt (8 CFR Part 254a.2(s) (1987)).

May 5, 1987 was established by the Attorney General as the beginning date for the application period for legalization. Section 245A(e) of the Act states that after the effective date of IRCA and prior to the beginning of the application period, an alien apprehended by INS who could establish a prima facie case of eligibility to have her or his status adjusted to a temporary resident could not be deported and had to be granted employment authorization. Such an alien must then apply for readjustment within the first 30 days of the application period. Further, an alien may not be deported and must be granted employment authorization pending a final determination of alien status if the alien presents a prima facie application for adjustment of status to temporary resident during the application period, which expires May 4, 1988.

On March 23, 1987 a stipulation resolved some of the claims raised in Catholic Social Services, Inc. v. Meese, Cv. No. S-86-1343. The stipulation arose in part due to a claim that INS's denial of employment authorization to aliens eligible for legalization violated the provisions of the Act which state that aliens may not be deported and must be granted employment authorization prior to the application period under IRCA and pending a final determination of status under IRCA. Under the stipulation the INS agreed to advise employers by way of an amended brochure that they are entitled to ask unauthorized aliens if they qualify for legalization under IRCA and intend to apply for legalization and work permits. If both of these questions are answered affirmatively, the alien is authorized to work and the employer is entitled to hire the alien without fear of penalty until September 1, 1987. This agreement has been referred to as the special rule.

The special rule was formally noticed by INS in the Federal Register (52 Fed. Reg. 16205). The INS also issued a Handbook for Employers (M-274(587)), of which we take official notice pursuant to Title 22, Code of Regulations, section 5110. Although the Handbook advises employers that they are not required to verify the status or complete the form I-9 (the INS form developed for verifying persons who are eligible to work in the United States) for employees hired before November 7, 1986, it does state that employers may hire or continue to employ employees who attest on the form that they have applied or intend to apply for legalization.

We will now consider the effects of IRCA on this claimant for purposes of his eligibility for unemployment insurance. The administrative law judge relied on section 245A(h)(1) of the Act which states that, unless otherwise specifically provided, an alien in temporary lawful residence status shall not be considered for purposes of any law of a state or political subdi-

vision providing for a program of financial assistance to be permanently residing in the United States under color of law. Based upon this provision, the administrative law judge determined that the claimant was ineligible for benefits under section 1264 of the code. The Department has conceded that this subsection does not apply.

Section 245A(h)(1) relates solely to programs of financial assistance. The Act defines these programs as those which provide for cash, medical, or other assistance designed to meet the basic subsistence or health needs of individuals, that are generally available to needy individuals and which receive funding from state or local government. Because unemployment insurance is an insurance program not based upon need, we do not then believe that it qualifies as a program of financial assistance.

On appeal to this Board the claimant's representative presents arguments to support two different effective dates which might be used to establish what wages earned in the claimant's base period could be used to support a claim for benefits under section 1264. The first argument we address is that section 201 of IRCA operates to retroactively adjust the status of a legalization-eligible individual to that of an alien lawfully admitted for temporary status as of January 1, 1982. This section requires the Attorney General to adjust the status of an alien to that of an alien lawfully admitted for temporary residence if the alien makes a timely application and meets specified requirements. The argument is that because the alien's status is adjusted to "lawfully admitted," the change in status relates back to the time that IRCA requires that the alien must have entered the United States. This date is January 1, 1982. As support for this argument the claimant's representative relies upon a House Report which sets forth increased estimates for unemployment compensation costs for newly legalized alien workers. It is argued that if Congress did not intend for legalized aliens to receive unemployment benefits in fiscal year 1987 it would not have estimated the cost of providing such benefits.

To support the argument that IRCA operates to make the claimant lawfully present or permanently residing under color of law after January 1, 1982, analogy is made to the plaintiff in Holley v. Lavine, 553 F.2d 845. In that case an alien with six minor children born in the United States seeking Aid to Families with Dependent Children benefits received a letter from an INS official indicating she would not be deported at least until her children were no longer dependent upon her. She was found to be permanently residing under color of law. The claimant is cast in a similar light as Congress, by way of IRCA, has acknowledged his presence as of January 1, 1982 and,

it is argued therefore, granted its permission retroactively for the claimant to reside in the United States since that time. The logical extension of this argument is that if Congress intended the status of the admission to the United States to change, it should change at the time of the illegal admission. In this case, that would be 1972. Such an interpretation is not supported by direct language in IRCA and would be in conflict with the regulation adopted by INS which expressly provides that the status of an alien whose application for temporary residence status is approved shall be adjusted as of the date indicated on the application fee receipt. In light of this regulation and the fact that ICRA contains no specific language regarding retroactivity of the change in status, we do not find a basis to support the contention that the claimant was permanently residing under color of law or lawfully present as of January 1, 1982.

The claimant's representative further argues that the claimant was permanently residing under color of law or lawfully present for purposes of performing services as of November 6, 1986, which is the effective date of IRCA. We agree that the provisions of IRCA support a finding that the claimant was lawfully present for purposes of performing services as of the effective date of IRCA. As set forth above, IRCA provides for a stay of deportation and mandatory work authorization prior to the May 5, 1987 beginning of the application period for aliens who could establish a prima facie case of eligibility for temporary residence status as well as during the application period for aliens who present a prima facie valid application for temporary residence status. Based upon these provisions, we find the claimant was authorized to work as of the effective date of IRCA. Furthermore, this claimant had been employed by the employer prior to the effective date of IRCA, and thus pursuant to the grandfather clause at section 101(a)(3) of IRCA was permissibly employed as of the effective date of IRCA. Therefore we conclude the claimant was lawfully present for purposes of performing services as of the effective date of IRCA based upon his eligibility to have his status adjusted by IRCA and by his subsequent timely application for temporary resident status.

On appeal to this Board the Department contends the claimant had no change in his status until he filed an application for temporary residence status and therefore, because this was after the time of his base period, none of the wages earned by the claimant during the calendar year 1986 could be used to support a valid claim. The Department further argues that the claimant was not covered by the special rule created by the stipulation reached in the Catholic Social Services case discussed above and therefore there is no basis for allowing the claimant to use wages earned as of November 6, 1986 to support a valid claim. We disagree and find that in fact the special

rule supports our prior finding that the claimant and others so situated were lawfully present for purposes of performing services as of November 6, 1986, based upon their eligibility to change their status as of that date and IRCA's mandate that such persons be granted authorization to engage in employment in the United States.

The Department contends that the special rule provisions are not applicable to this claimant as he was not a new hire during the special rule period. Had he been, the Department would concede that he was lawfully present for purposes of performing services and able to utilize base period wages as of November 6, 1986. The Department's argument is unacceptable for several reasons. The special rule was developed as a result of a stipulation for the entire class of aliens who could establish a prima facie case of eligibility for adjustment of status under IRCA. Clearly the claimant was in this class. It would be an absurd result to find that aliens who were new hires during the special rule period would be entitled to benefits that persons who were already employed would be denied. Our view is supported by INS publication M-274, Handbook for Employers, which states in provisions regarding the special rule that employers may hire or continue to employ employees who attest on the form I-9 that they have applied or intend to apply for legalization. Thus, persons such as the claimant who were already employed were covered by the special rule procedure. Further, such persons were not required to be employment-verified due to the grandfather clause at section 101(a)(3) of IRCA. In this case, the employer was not required to complete a form I-9 for the claimant as he was hired before IRCA became effective. We do not think that the claimant should be penalized for the employer's election not to complete a form I-9 on his behalf. Therefore, we reject the Department's contention.

In conclusion, we believe that the claimant is entitled to use wages earned after November 5, 1986 to establish a valid claim. As of November 6, 1986, the effective date of IRCA, the claimant was eligible to change his status had INS been able to implement IRCA. Also, the claimant's employer was not subject to prosecution for employing the claimant as of that date. Further, the claimant was work-authorized as of that date had he been apprehended by INS. The record in this case does not disclose when in the base period the claimant earned the wages upon which his claim is based. Accordingly, the matter must be remanded to the Department for computation of the amount of wages earned for the period from November 6 through December 31, 1986, and to determine whether those wages are sufficient to meet the requirements of section 1281 of the code.

DECISION

The decision of the administrative law judge is modified. The claimant is ineligible for benefits under section 1264 of the code based on earnings through November 5, 1986. The claimant is not ineligible under that code section based on earnings beginning November 6, 1986. The matter is remanded to the Department to determine if wages sufficient to establish a valid claim under section 1281 of the code remain in the claimant's base period after November 5, 1986.

Sacramento, California, March 15, 1988.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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